proceeding in which he was called upon to defend a proper and well-earned fee.

Note.

This is a decision upon a point of interest to lawyers having bankruptcy litigation, and authority upon the construction of § 60d of the bankruptcy law seems to be neither abundant nor decided. The court here cites not a single case. But we find it laid down in Remington on Bankruptcy, § 2095, that all payments made before bankruptcy to the attorney in contemplation of the institution of bankruptcy proceedings are to be governed by the provisions of § 60d, citing, as impliedly so holding, In re Habegger, 15 A. B. R. 198, 139 Fed. 623. The court here does not seem to think it necessary to waste much argument to show that a payment for services already rendered stands on the same footing with a payment for future services, and we agree with the court. A late case holding that such prepayment is neither a preference nor a fraudulent conveyance is Furth *v.* Stahl, 10 A. B. R. 442, 205 Pa. 439. See also, In re Wood & Henderson, 20 A. B. R. 1, 210 U. S. 246. But prepayment of attorneys' fees by bankrupts is not favored in bankruptcy, as said in one case. In re Blanchard, 20 A. B. R. 417, 161 Fed. 793. And Mr. Remington considers that § 60d applies as well to payments for service rendered as for services to be rendered in the proposed bankruptcy, deducing it impliedly from this § 60d. See § 2094, Remington on Bankruptcy, vol. III.

J. F. M.

SUPREME COURT OF APPEALS OF VIRGINIA.

WHITE *et al. v.* OLD *et al.*

June 13, 1912.

[75 S. E. 182.]

1. Wills (§ 456*)—Construction—Meaning of Words.—Words in a will which have a definite primary meaning must be understood to be used in such sense, unless an intention to use them in another sense manifestly appears.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 974; Dec. Dig. § 456.*]

2. Wills (§ 499*)—Construction—Meaning of Words—"Niece" or "Nephew."—Testator gave a legacy to his niece Kate, daughter of Dr. H. W., and to Dr. H. W. a specified sum for himself and his other children, and he gave legacies to any niece or nephew whom he had omitted, excepting the children of Dr. H. W., for whom he had made provision. Testator was a widower, who had never had any children, and left surviving him a number of nieces and nephews, and grandnieces and grandnephews, descendants of sisters who died

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

before the execution of the will. There were two Drs. H. W., father and son; the father being the father of the niece Kate. Testator had a niece Mrs. P., who was omitted from the will, and the legacy to her was on her death paid to her children. Held that the words "niece or nephew" did not embrace grandnieces and grandnephews.

[Ed. Note.—For other cases, see Wills, Cent. Dig., § 1067; Dec. Dig., § 499.*

For other definitions, see Words and Phrases, vol. 5, pp. 4775, 4776, 4807, 4808.]

3. **Wills (§ 483*)—Construction—Property, Devised—Effect.**—Testator provided that if, under the decision of the Supreme Court of Appeals recently rendered in a suit involving the construction of his wife's will, he should receive his distributive share of her estate free from claims, he desired his executor to purchase a lot in the city of Norfolk to erect thereon a public library building, and he devised to the Norfolk Public Library, a domestic corporation, such lot, provided it would erect a public library building thereon. The executor was unable to carry out the provision immediately, and subsequently another donated a lot as a site for a public library building, and the library corporation, with funds furnished by a third person, erected a public library thereon. The library corporation insisted that the lot devised by testator was necessary to meet the growing needs of the city for another library building, and insisted on its capacity to hold, and its ability and readiness to erect thereon a suitable library building. Held, that the devise was valid.

[Ed. Note.—For other cases, see Wills, Cent. Dig., § 1014; Dec. Dig., § 483.*]

Appeal from Law and Chancery Court of City of Norfolk.

Suit by W. W. Old, executor of Henry Dubois Van Wyck, deceased, against one White and others, to construe the will of the deceased. From a decree construing the will, certain defendants appeal. Reversed in part, and affirmed in part.

N. T. Green and *Marcus Jones,* for appellants.

J. B. Jenkins, W. W. Old, Jr., G. Tayloe Gwathmey, and *A. B. Seldner,* for appellees.

WHITTLE, J. This bill was filed by W. W. Old, executor of Henry Dubois Van Wyck, deceased to construe two clauses of testator's will. The first of these clauses is as follows:

"To any niece or nephew of mine whom I have omitted or neglected in making the above provisions (excepting the children of Dr. Howell White, for whom I have provided as hereinbefore set out) the sum of three thousand dollars."

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

The testator was a widower, who had never had any children and left surviving him a brother, and nieces and nephews, and grandnieces and grandnephews, descendants of four sisters who died before the execution of the will. Dr. Howell White, here mentioned, was a nephew, and appellees' contention is that the effect of the parenthetical language employed in the foregoing clause referring to the children of Dr. White, who were grandnieces and grandnephews of the testator, manifests a purpose to enlarge the primary meaning of the words "any *niece* or *nephew*," so as to include *grandnieces* and *grandnephews*. The trial court so construed the clause, and from that ruling the residuary legatees appealed.

The provision for the White children referred to occurs in a previous clause of the will as follows: "To my niece Kate Bartow, daughter of Dr. Howell White and Helena White, the sum of two thousand dollars; and to Dr. Howell White the sum of ten thousand dollars for himself and his other children." There were two Drs. Howell White, father and son. That the first part of the preceding clause refers to the elder White is made plain by the fact that he is the father of Kate Bartow; and that the subsequent bequest of $10,000 to Dr. Howell White, "for himself and his other children," has reference to Dr. Howell White, Jr., is shown by the circumstance that the only children of the elder Dr. White are Mrs. Kate Bartow and Dr. Howell White, Jr. Besides, the pleadings show that the father predeceased the testator. The adjective "other," which precedes "children," has no significance; and the conclusion that its insertion was a mere inadvertence gains color from the fact that prior to the execution of the present will the testator had, at different times, prepared three drafts of wills along the same general line, and in the corresponding clause in each of these drafts the word "other" is omitted.

We pass, then, to the consideration of the concrete question involved in this branch of the controversy, namely, whether testator, in using the words "niece" and "nephew," intended to include grandnieces and grandnephews.

[1] It is a canon of construction that words in a will or other written instrument which have a definite primary meaning must be understood to be used in that sense, unless an intention to use them in some other sense manifestly appears. Nye *v.* Lovitt, 92 Va. 710, 24 S. E. 345; Vaughan *v.* Vaughan, 97 Va. 322, 33 S. E. 603; Brett *v.* Donaghe, 101 Va. 786, 45 S. E. 324; Roberson *v.* Wampler, 104 Va. 380, 51 S. E. 835, 1 L. R. A. (N. S.) 318; Roanoke *v.* Blair, 107 Va. 639, 60 S. E. 75.

In 3 Jarman on Wills (5th Am. Ed., from 4th London Ed., notes by Randolph & Talcott) p. 707, rule XVI, the principle is

thus stated: "That words, in general, are to be taken in their ordinary and grammatical sense only, unless the clear intention to use them in another can be collected and that other can be ascertained.

In Wootton *v.* Redd, 53 Va. 196, Judge Lee, at page 206, observes: "Conjecture cannot be permitted to usurp the place of judicial conclusion, nor to supply what the testator has failed sufficiently to indicate." Waring *v.* Bosher, 91 Va. 286, 21 S. E. 464; Allison *v.* Allison, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920. See, also, the opinion of Mr. Justice Blackstone in Perrin *v.* Blake (1771) Hargrave's Law Tracts, 489-510; s. c. 10 Eng. Rul. Cases, 689.

In Crook *v.* Whitely, 7 De G., M. & G. 490 (44 Eng. Reprint, 191), Lord Chancellor Cranworth remarks: "According to the ordinary rule of construction, the word 'niece' as used in this will must be taken in its natural sense, which means the children of a brother or sister."

In Schouler on Wills, § 536, it is said: "Notwithstanding the equivocal sense of 'nepos,' in Roman jurisprudence, 'nephew' means in English law the son, and 'niece' the daughter, of a brother or sister, and greatnephews and greatnieces are not embraced by the term."

So, in Lomax on Executors, 36, subsec. 15: "'Nephews' and 'nieces' will not, upon the principles already stated with respect to the construction and enlargement of the term 'children' and 'grandchildren,' ordinarily comprehend grandnephews and grandnieces."

The rule that "children means generally issue in the first degree, and does not embrace grandchildren," has been repeatedly decided by this court. Smith *v.* Chapman, 11 Va. 246; Thomason *v.* Anderson, 31 Va. 127, 128; Moon *v.* Stone, 60 Va. 130; Waring *v.* Waring, 96 Va. 641, 32 S. E. 150; Vaughan *v.* Vaughan, supra; Brett *v.* Donaghe, supra.

[2] Looking, therefore, to the will as a whole, we find nothing upon which to lay hold as a safe guide to indicate an intention on the part of the testator to use the words "any niece or nephew of mine" in other than their primary or ordinary sense. It will be noted that, exclusive of the clause under interpretation, testator employs the word "niece" only twice in his will. He speaks of his "niece" Mrs. Van Geisen and of his "niece" Kate Bartow, and in each instance applies the word in its primary sense. On the other hand, the words "grandniece" and "grandnephew" do not occur in the entire will, but legatees of that class are designated either by name or as the "children" of their parents.

In Re Woodward, 117 N. Y. 522, 23 N. E. 120, 7 L. R. A. 367, the court uses this language: "As to the appellants, they

are called by the testator, not 'nephews' or 'nieces,' but 'children' of his deceased 'niece,' and in the same clause are twice referred to in that manner—a discrimination in language and choice of words of description which indicate no intention to include the persons named with nephews and nieces, but the contrary. It is obvious that testator had in his mind the different degrees of relationship of his various beneficiaries, and the selection of different words to describe them cannot be attributed to mistake or inadvertence."

It moreover appears that testator had a niece, Mrs. Catherine Parks, who was omitted from his will, and that fact satisfies the language of the clause in judgment, other than the parenthetical proviso. Mrs. Parks having died, her legacy was paid to her children. Yet, if the construction given to the clause be correct, each of these children of Mrs. Parks, in addition to their mother's portion, is entitled to receive a legacy of $3,000, which could hardly have been testator's intention.

In Shelly *v.* Bryan (1821) Jacobs, 207 (37 Eng. Reprint, 824), a leading case on the meaning of "nieces" and "nephews," Sir Thomas Plummer, M. R., says: "But it would be contrary to the authorities to interpret a term having a proper application to one class as extending to two classes, comprising both parents and children."

And in Crook *v.* Whitely, supra, Lord Chancellor Cranworth observes: "But I do not know any case in which it has been held that the same words can be construed to include persons of different degrees in the same class."

This brings us to the consideration of the force to be given the parenthetical words, upon which the decision of the court of law and chancery seems to have been rested, in the clause under construction: "To any niece or nephew of mine whom I have omitted or neglected in making the above provisions (excepting the children of Dr. Howell White, for whom I have provided as hereinbefore set out) the sum of three thousand dollars."

The argument is based on the ground that as Dr. Howell White was himself a nephew of testator, and his children grand nieces and grandnephews, the parenthetical words would be useless unless the testator intended to include grandnieces and grandnephews in the expression "any niece or nephew of mine."

The clause as a whole is at most only a precautionary one, intended to avoid the possibility of pretermitting any of a named class. But in no aspect of the situation is the parenthetical exception necessary to effectuate any intention of the testator. It in terms applies only to "omitted or neglected" nieces and nephews, and (even if grandnieces and grandnephews were intended to be included) it could by no possibility have affected

the rights of the children of Dr. Howell White, who were neither "omitted" nor "neglected," but had already been provided for. So that the contention amounts to this: That a useless provision in a precautionary clause in a will shall, by implication, be given the effect of introducing a new class of beneficiaries, embraced by no other language of the will. Such a deduction from an implication affords a most unsafe guide in the exposition of wills or other writings.

In this connection it would be wise to keep in mind the admonition of Sir William James, L. J., in Re Blowers Trust (1870) L. R. Ch. App. Cases, 350 (a case like the instant case, where it was sought to vary the ordinary meaning of the words "nephews and nieces," so as to include "grandnephews and grandnieces"): "But before we alter the meaning of words in obedience to a supposed indication of intention of the testator —before we deviate from the direct path in order to follow a light which appears to be held out by the testator—we must take care to be reasonably sure that it is a genuine light, and that we are not following the glare of a will-o'-the-wisp into a morass."

The effect of provisos and exceptions in a statute was luminously considered by the House of Lords in Guardians of the Poor *v.* Metropolitan Life Assurance Society, A. C. (1897) 647, a number of their lordships delivering opinions. Lord Chancellor Halsbury says: "It [his construction of the act] satisfies the words, whilst the other view [that the proviso enlarged the enacting clause] gives to the proviso a meaning which I think would be most formidable, not merely with reference to the question which is now under debate before your lordships, but also as a matter of construction, that a proviso could be so read as to suggest that the previous part of the section of which it is a proviso should imply by law the existence of words there of which there is not a trace in the previous words of the section itself. My lords, that certainly would be a very serious invasion upon any rule of construction by which any document, whether an act of Parliament or anything else, has ever been construed, and I should be very much averse indeed to lend any countenance to such a mode of construing a proviso."

Lord Davey said the whole argument was based on "the old and apparently ineradicable fallacy of importing into an enactment which is expressed in clear and apparently unambiguous language something which is not contained in it, by what is called implication from the language of a proviso which may or may not have a meaning of its own." Sutherland, Stat. Constr. § 222; Tinkham *v.* Tapscott, 17 N. Y. 141, 152: Baggaley *v.* Pittsburg & L. S. I. Co. (C. C. A.) 90 Fed. 636, 36 C. C. A. 202.

The provision of the will construed in Cromer *v.* Pinckney,

3 Barb. Ch. (N. Y.) 4 6, cited in the opinion of the trial court, was essentially different from the clause before us. The language of the bequest in that case was: "To the children of my nephew John Cromer." John Cromer, though a grandnephew, was described as a "nephew," which showed conclusively that the word "nephew" was not used by the testator in its primary sense.

Our conclusion, therefore, upon this branch of the case, is that testator used the words "niece" and "nephew" in their ordinary sense, and that the court of law and chancery erred in holding that those words embraced greatnieces and greatnephews.

[3] The other clause of the will involved in this appeal is as follows: "If under the decision of the Supreme Court of Appeals of Virginia recently rendered in the suit therein pending involving the construction of my wife's will, I shall receive my distributive share of her estate free from the claims of fees of the attorneys asserted therein, then I desire my executor to purchase a lot in the city of Norfolk, Virginia, for the purpose of having erected thereon a building for a public library, he to use and invest the money necessary to purchase the said lot as he may think best, and such lot so purchased I devise and bequeath to the Norfolk Public Library, a corporation chartered by the state of Virginia, if the said corporation will erect or have erected a suitable building thereon for a public library, and desire my executor to make or have made the proper conveyance of the said lot to the said corporation."

The decree appealed from upholds this provision of the will. The executor was not able to carry out the provisions immediately upon taking charge of the estate; and subsequently the family of the late Dr. William Selden donated a lot as a site for a library building, and the corporation, with funds furnished for the purpose by Andrew Carnegie, erected a public library thereon. Nevertheless the corporation insists that it is not limited to a single library building, and that the lot in question is necessary to meet the growing needs and demands of the citizens of Norfolk for another library building in the interest of literary improvement. And it insists upon its capacity to take and hold the lot donated by the testator, and its ability and readiness to erect or cause to be erected thereon a suitable building for a public library, as provided for in testator's will.

In these circumstances, there was plainly no error in the decree appealed from, sustaining the devise.

Upon the whole case, the decree must be reversed in part and affirmed in part, as outlined in this opinion.

Reversed in part; affirmed in part.

KEITH, P., absent.